1. Decision of the Supreme Court of the State of Delaware, issued on July 6, 2000. A1-A15.

2. Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law of the Supreme Court of the State of Delaware, issued on September 24, 1999. A16-A42.

3. Stipulation, In the Matter of Arons, et al., No. UPL-4, 1999, Before the Board o the Unauthorized Practice of Law of the Supreme Court of the State of Delaware. Dated August 6, 1998. A43-A53.

4. Stipulation, In the Matter of Arons, et al., No. UPL-4, 1999, Before the Board o the Unauthorized Practice of Law of the Supreme Court of the State of Delaware. Dated June 23, 1999. A54-A57.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

IN THE MATTER OF: MARILYN ARONS, RUTH WATSON and PARENT INFORMATION CENTER OF NEW JERSEY, INC., Respondents.

No. 440, 1999

UPL No. 4, 1996

Submitted: May 23, 2000
Decided: July 6, 2000

Before VEASEY, Chief Justice, WALSH, HOLLAND, HARTNETT,* and BERGER, Justices, constituting the Court *En Banc.*

Upon Review of the Findings and Recommended Disposition of the Board on the Unauthorized Practice of Law. Affirmed.

Mary M. Johnston, Esquire, Chief Counsel and Michael S. McGinniss, Esquire, Disciplinary Counsel, (argued), Office of Disciplinary Counsel, Wilmington, Delaware, for Appellee.

Walter Speed Rowland, Esquire, Wilmington, Delaware and David C. Vladeck, Esquire (argued) and Amanda Frost, Esquire, Public Citizen Litigation Group, Washington, D.C. for Appellants-Respondents.

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*Retired Justice sitting by designation pursuant to Del. Const. art. IV Sec. 38.

Bill Lann Lee, Esquire, Acting Assistant Attorney General, Mark L. Gross, Esquire, and Lisa J. Stark, Esquire, Department of Justice, Washington, D.C., for The United States as Amicus Curiae.

WALSH, Justice:

This is an appeal from a decision of the Board on the Unauthorized Practice of Law (the "Board"), an arm of the Supreme Court of Delaware, concluding that the appellants had engaged in the unauthorized practice of law. The appellants, supported by the United States Department of Justice as *amicus curiae*, contend that the Board erred in not recognizing their entitlement under federal law to represent parents of children with disabilities before State administrative agencies. That entitlement, it is argued, preempts state law and is supported by due process considerations. We conclude, however, that the Board's decision is supported by the evidence and free of any error of law. Accordingly, we affirm.

I

The appellants, Marilyn Arons and Ruth Watson, are, respectively, the founder and Executive Director of Parent Information Center of New Jersey, Inc. (collectively "Appellants"). The Parent Information Center is a non-profit organization founded in 1977 that provides advice, counseling and advocacy services to families of children with disabilities. On five occasions, the Center has represented families of children with disabilities in "due process" hearings held by the Delaware Department of Public Instruction pursuant to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*[1] Four of these five hearings were

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[1]Because Delaware participates in and receives federal funds under the IDEA, proceedings governing the special

handled by Arons, while the other hearing was handled by Watson. Although neither Arons nor Watson is an attorney, both possess special knowledge and training with respect to the problems of children with disabilities.

The IDEA is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education." 20 U.S.C. § 1415(a). Under the IDEA, the parents of a disabled child are entitled to challenge any proposal to change or initiate, or refusal to change or initiate, the identification, evaluation, educational placement or any other aspect of the provision of a free appropriate [*4] public education service to that child. *See id.* at § 1415(b)(3). When complaints are received, "the parents involved in such complaint shall have the opportunity for an impartial due process hearing." *Id.* at § 1415(f).

Due process hearings in Delaware are conducted in a manner typical of contested, adjudicatory hearings. The parties include the parent(s), the local school board and the Department of Public Instruction. The hearing is conducted by a three-member panel consisting of an attorney admitted to practice in Delaware; an educator who is either certified in the area of special education or who has been a post-secondary educator in the area of programs for students with disabilities; and a lay person with demonstrated interest in the education of students with disabilities from an approved list compiled by the Governor's Advisory Counsel for Exceptional Citizens. Hearings are chaired by the attorney member of the panel.

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education of children with disabilities conform to IDEA requirements, as well as Delaware law.

Due process hearings usually last from two to four days. The school board and the Department of Public Instruction are always represented by counsel. The hearing begins with opening statements from each party. Evidence is then presented through witnesses, who are subjected to direct and cross-examination. Although the rules of evidence do not apply strictly, the Chair rules on legal issues, the qualification of experts and objections to relevance, materiality and admissibility. Following the presentation of evidence, the parties make closing statements and may be asked to file written submissions on key questions.

On August 8, 1996, the Office of Disciplinary Counsel ("ODC") filed a petition with the Board requesting that Arons, Watson and the Parent Information Center be declared to have engaged in activities constituting the unauthorized practice of law by representing families of children with disabilities in due process hearings. While admitting the representation of at least five such families in Delaware due process hearings, Appellants denied that their activities, even if amounting to the practice of law, constitute the *unauthorized* practice of law. They argued that section 1415(h)(1) of the IDEA permits the representations in which they have engaged and preempts any state-law proscription against the unauthorized practice of law that might otherwise apply. That section provides that any party to a due process hearing "shall be accorded .... the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities." They also claimed that Delaware is alone among the fifty states in precluding non-lawyer representation in these circumstances.

The matter was submitted to the Board on a stipulation of facts, including transcripts of due process hearings, briefs, oral argument and post-hearing correspondence. On September

24, 1999, the Board issued a written opinion concluding that the IDEA does not authorize the practice of law by non-lawyers, including Appellants, in due process hearings. This appeal followed. Following the entry of this appeal, the United States Department of Justice sought leave to appear as an *amicus curiae*. Leave was granted and the Department has filed a brief in support of Appellants' position.

II

The present appeal poses the first occasion for this Court to exercise its power of review of decisions of the Board. Under Supreme Court Rule 86(e), this Court will accept factual findings by the Board so long as they are supported by substantial evidence. We review on a *de novo* basis findings by the Board related to legal issues. *See* Supr. Ct. R. 86(e). Because the parties stipulated to the facts in this matter and the only dispute relates to matters of law, this Court's review on all issues is *de novo*.

Appellants' principal argument is that the IDEA guarantees parents the right to have trained non-lawyers advocate on their behalf in due process hearings. They contend that the IDEA could hardly be clearer because it draws no distinction between counsel and "individuals with special knowledge or training with respect to the problems of children with disabilities." To the extent that Delaware law conflicts with federal law, the argument runs, Delaware law is displaced and federal law governs.

The ODC responds that the IDEA unambiguously supports *its* position. It argues that counsel have inherent and presumptive representational ability and authority, while educational consultants do not, and that the statutory language of section 1415(h) neither creates nor implies an equivalence of permissible roles for "counsel" and for "individuals with special

knowledge or training."

Appellants and the ODC each argue that the pertinent language of the IDEA in dispute -- "the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities" -- unambiguously supports their respective positions. We do not share the parties' vision of clarity. In our view, section 1415(h)(1) is ambiguous to the extent it appears to confer joint authority on lawyers and non-lawyers to accompany and advise parents and others affected by the operation of the due process hearings provided under the IDEA. That being said, however, case law as well as statutory history support the ODC's interpretation.

The pertinent language of section 1415(h)(1) has been discussed by the United States Court of Appeals for the Third Circuit in *Arons v. New Jersey State Board of Education*, 3d. Cir., 842 F.2d 58 (1988). In that case, Appellant Arons sought an award of fees for her successful representation of parents in a due process hearing in New Jersey, where state law allows non-lawyers to represent parents in due process hearings. In affirming a decision of the United States District Court for New Jersey that held that the New Jersey regulation authorizing such fees permitted payment of only legal fees and not those of lay advocates, the court of appeals rejected the statutory intent argument advanced by Appellants here. The court explained:

> The carefully drawn statutory language does not authorize these specially qualified individuals to render legal services. Although the [IDEA] does give "any party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," those functions are not designated to

> be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection (d)(1), as would be expected if Congress intended to place expert and legal counsel on the same footing.
>
> Our search through the legislative history has failed to uncover any indication that Congress contemplated that the "individuals with special knowledge" would act in a representative capacity. The Senate Report describes the "individual's" role as one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement.
>
> The provisions's [sic] text and history thus cast substantial doubt on the plaintiff's statement in her brief that "Congress intended that no distinction be drawn between lawyers and lay advocates."
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> * * *

842 F.2d at 62-63 (citations omitted).

Because the sole issue presented in *Arons* was whether a lay advocate, whose authority to represent parents in the IDEA proceedings was unchallenged, was entitled to seek fees for her services, the *Arons* holding is contextually distinct from the issue posed in this appeal. We find the analysis of the federalism issue articulated by the court of appeals to be persuasive. That court's reference to a 1975 Senate Report

discussing the IDEA[2] is arguably dicta. Nevertheless, the contents of the Senate Report describing the nonlawyer's role as one of consultation is compelling evidence that Congress did not intend non-lawyers to advocate on behalf of parents in due process hearings. *See Arons*, 842 F.2d at 62 (citing S. Rep. No. 94-168 (1975)).

Also supportive of the ODC's proposed interpretation of the IDEA are a Senate Conference Report addressing the statute and remarks made by the original author of the Senate bill, Senator Harrison Williams of New Jersey. The Conference Report states that in administrative due process hearings a party is entitled to "the right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." S. Conf. Rep. No. 94-455 (1975). Senator Williams, in providing a detailed analysis of the legislation before the Senate on November 19, 1975, echoed those words verbatim. *See* 121 Cong. Rec. 37416. This language confirms the clear distinction that Congress envisioned between the representational role of counsel and the advisory role of non-lawyers.

Recent amendments to the IDEA further bolster the ODC's position. Pursuant to these amendments, one of the safeguards required for agencies receiving federal funds under

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[2]The Senate Report actually discusses the forerunner to the IDEA, the Education of All Handicapped Children Act ("EHA"). Because the EHA and the IDEA are identical with regard to the language relevant to the present discussion, this opinion will not draw a distinction between the two Acts and will refer to both as the IDEA.

the IDEA is the adoption of procedures by the agency "that require the parent of a child with a disability, *or the attorney representing the child*, to provide notice" to the state or local educational agency of certain information in connection with a complaint. 20 U.S.C. § 1415(b)(6) and (7) (emphasis added). The word "attorney" is an indisputable reference to a member of the Bar and not a layperson, even if that layperson possesses "special knowledge or training with respect to the problems of children with disabilities." Equally supportive of the ODC's position is the fact that while the IDEA has been amended several times since *Arons* was decided, Congress has not attempted to overrule that judicial interpretation.

Finally, Congress has explicitly included language in other federal statutes to permit lay representation where such a result was intended. *See, e.g.*, 7 U.S.C. § 2020(e)(7) (Food Stamp Act provision allowing households in certification process to "be represented by a person other than a member of the household so long as that person has been clearly designated as the representative .... and .... is an adult."). Congress obviously knows how to provide such authority when it wishes to do so. The absence of similar language in the IDEA strongly suggests that Congress chose not to create a right to lay representation in due process hearings.

Appellants place great reliance on, and request our deference to, an interpretation of section 1415(h)(1) contained in an April 8, 1981 letter of Theodore Sky, the then acting General Counsel of the United States Department of Education. That letter was written in response to a request by the Superintendent of Public Instruction for the State of Washington for a "legal analysis regarding the role of lay advocates in educational agency administrative hearings" conducted under the IDEA. The superintendent suggested that the IDEA's language indicates that non-lawyers are not in fact

authorized to engage in activities conventionally viewed as legal representation, such as examining and cross-examining witnesses. In its response, the Department of Education rejected the superintendent's reading of the IDEA, concluding that notwithstanding the Senate Conference Report and the absence in section 1415(h)(1) of the term "represent," lay advocates are permitted to represent parties at due process hearings and appeals under the IDEA.

In reaching its conclusion that section 1415(h)(1) authorizes lay representation in due process hearings, the Department of Education relied on three factors. First, it reasoned that because no "bifurcation of function" is set forth in the statute between counsel on the one hand and individuals with special knowledge or training on the other, the permissible roles of the two must be the same. Second, the Department looked to the remarks of Congressman George Miller and Senator Alan Cranston, both of California. Congressman Miller, a member of the Subcommittee on Select Education which prepared the House bill, explained section 1415(h)(1) to his colleagues by observing that parents "will have the right to be accompanied by counsel or other qualified individuals who possess 'special knowledge or training with respect to the education of handicapped children.'" 121 Cong. Rec. 25539 (1975). Senator Cranston noted that the "procedural requirements [of the IDEA] are consistent with the existing California statutory and master plan requirements on this subject," which, at the time, permitted the lay representation of parties in California due process hearings. 121 Cong. Rec. 37419 (1975). Third, the Department relied upon the fact that lay representation had been authorized by Congress for certain other types of administrative proceedings.

Because section 1415(h)(1) is arguably ambiguous, the Department's interpretation of that section is entitled to some

level of deference by this Court. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). Here, however, that level of deference is modest. Where Congress has not expressly delegated "authority to an agency to elucidate a specific provision of the statute by regulation," deference is due only to a "reasonable" administrative interpretation. *Id.* at 843-44. Further, less deference is due to informal agency interpretations, such as that expressed in the Sky letter, than to formal agency regulations adopted after a notice and comment period. *See Cleary v. Waldman*, 3d Cir., 167 F.3d 801, 807-08 (1999).

Even if this Court were required to give greater deference to the Department of Education's interpretation of section 1415(h)(1), it is doubtful whether that interpretation could withstand the sheer weight of the legal and factual support for the opposite conclusion. The Department's analysis of the statute is subject to criticism. First, in concluding that the permissible roles of counsel and individuals with special knowledge or training with respect to the problems of children with disabilities must be the same, the Department overlooked the inherent and presumptive representational authority with which counsel are cloaked and non-lawyers are not. Second, the Department selectively chose statements made by two lawmakers, while placing no weight on the Senate Report, the Senate Conference Report, or the remarks of Senator Williams. Such an approach renders that aspect of the Department's analysis questionable. *See generally Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980) ("Contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."). Finally, the Department's reliance upon the fact that lay representation had been authorized by Congress for certain other types of administrative

proceedings is puzzling because as previously noted, that factor actually supports the opposite conclusion - that Congress knew how to authorize lay representation when it wished to do so.

III

In addition to their statutory interpretation argument, Appellants contend even if the IDEA does not expressly entitle them to represent parents in due process hearings, due process would be violated by forbidding parents from having non-lawyer representation in hearings under the IDEA. They note that due process hearings are formal adversarial proceedings in which the State of Delaware funds the attorneys who argue for the parents' adversaries. Denying parents and children access to "the only assistance available to them," the argument goes raises "unyielding due process problems."[3]

The parties agree that *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976), governs the determination of what process is due to safeguard a child's fundamental right to education. Under *Mathews*, courts must consider: (i) the importance of the individual interest involved;

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[3]This Court has some difficulty understanding the applicability of this argument to the matter at hand. It is not alleged that forbidding parents from having non-lawyer assistance in hearings under the IDEA will deprive the Appellants of their due process rights, nor are the parents, whose rights are purportedly abridged, parties to this action. Appellants appear to be acting as surrogates in pressing the due process claim. We will address Appellants' argument, however, in the context of adopting a statutory construction that will avoid constitutional entanglements. See DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

(ii) the value of specific procedural safeguards to that interest; and (iii) the governmental interest in fiscal and administrative efficiency. *See id.* at 335.

The ODC acknowledges that the individual liberty interest at stake in due process hearings under the IDEA is substantial. It also concedes that some parents will forego their statutory right to contest changes to their child's education plan because they cannot afford legal counsel and will opt not to proceed *pro se* due to the complexity of the hearings and the prospect of facing two sets of government lawyers. The ODC submits, however, that Appellants "grossly and unfairly" exaggerate the risk that Delaware will deprive children of that interest unless the children and their parents are allowed to be represented by lay advocates. In this regard, the ODC notes that Delaware's Community Legal Aid Society has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria. The ODC further contends that the State of Delaware has a compelling interest in regulating the practice of law within its boundaries, and that this interest significantly outweighs any potential benefit that some individual parents and children may obtain through the services of lay advocates.

We agree. A balancing of the *Mathews* factors suggests that procedural due process would not be violated by forbidding parents from having non-lawyer representation in hearings under the IDEA. While there is no question of the importance of the individual interests involved, it seems clear that parties to an IDEA hearing are already provided with substantial procedural safeguards. The hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings, including the direct and cross-examination of witnesses and the required exchange of witness lists and documents in advance of

the hearing.[4] While we recognize that Appellants possess some expertise in the area of the educational needs of disabled children, they admittedly lack the training and skills that lawyers are expected to exhibit in matters of evidence and procedure. Second, it seems logical that the third *Mathews* factor, i.e., "governmental interest in fiscal and administrative efficiency," would encompass this State's exclusive authority to regulate the practice of law. It would also implicate the ODC's argument that lay advocates are unregulated and, unlike members of the Bar, are not answerable to the disciplinary process that operates as an arm of this Court. This Court does not exercise its inherent authority to regulate the practice of law for the purpose of protecting the financial interests of the lawyer. Our role is to insure that the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others.

Finally, the record does not support Appellants' assertion that parents and children will be denied access to "the only assistance available to them." The stipulation of the parties does state that the five families represented by the Appellants looked diligently to find legal counsel to represent them on a reduced-cost or *pro bono* basis prior to obtaining Appellants' services. But the record also reflects that Delaware's Community Legal Aid Society has in the past provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance

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[4]We also believe that the three member panel consisting of an attorney, an educator in the area of special education, and a lay person with demonstrated interest in the education of students with disabilities, affords parents an unbiased hearing and, coupled with the above mentioned safeguards, adequate structural protection.

criteria. The record further reflects that the State Superintendent of Public Instruction and the district involved are required to provide information to parents regarding the availability of free or low-cost legal services which may be available. If it could be demonstrated that an unmet need exists and that the local bar could not adequately respond, this Court would consider the adoption of a rule allowing lay representation in a certain limited class of cases. *See, e.g.*, Supr. Ct. R. 57 (permitting civil actions before Justice of the Peace Courts in which an artificial entity or public body is a party to be prosecuted and/or defended by an officer or employee of that artificial entity or public body, who need not be an attorney duly licensed to practice law in this State). At present, however, such a need has not been demonstrated.

IV

For the foregoing reasons, the language of section 1415(h)(1) cannot be interpreted as granting any clear right to lay representation. This conclusion renders moot Appellants' claim that the IDEA preempts any state-law proscription against the unauthorized practice of law that might otherwise apply to the activities of such individuals with special knowledge or training in this context. Accordingly, we affirm the decision of the Board.

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF THE
SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF: MARILYN ARONS, RUTH WATSON and PARENT INFORMATION CENTER OF NEW JERSEY, INC., Respondents.

No. UPL-4, 1996

(UPL File Nos. 94-12; 95-17)

Mary M Johnston, Chief Counsel, and Michael S. McGinniss (argued), Disciplinary Counsel, Wilmington, Delaware, attorneys for Petitioner Office of Disciplinary Counsel

Walter Speed Rowland, Wilmington, Delaware, and David C. Vladeck (argued) and Amanda Frost, Public Citizen Litigation Group, Washington, D.C., attorneys for Respondents Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc.

Before: Samuel A. Nolen, Esquire, Panel Chair, and Cheris Dawn Congo and John W. Paradee, Esquire, Panel Members

FINDINGS AND RECOMMENDED DISPOSITION

On August 8, 1996, the Office of Disciplinary Counsel ("ODC") filed a petition with the Board on the Unauthorized Practice of Law requesting that the Board declare that respondents Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc. have engaged in activities constituting the unauthorized practice of law by

representing families of children with disabilities in "due process" hearings held by the Delaware Department of Public Instruction pursuant to the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*

Respondents timely appeared and responded to the petition. While admitting the representation of at least five such families in Delaware due process hearings, respondents deny that their activities, even if amounting to the practice of law, constitute the unauthorized practice of law. It is the respondents' assertion that Section 1415(h)(1) of IDEA, 20 U.S.C. § 1415(h)(1), which provides that any party to a due process hearing "shall be accorded ... the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities ...," authorizes the representations in which they have engaged and preempts any state-law proscription against the unauthorized practice of law that might otherwise apply to the activities of such individuals with special knowledge or training in this context.

The matter was submitted to the Panel on a stipulation of facts including transcripts of due process hearings, briefs, oral argument, and post-hearing correspondence. For the reasons set forth below, we conclude that IDEA does not authorize the practice of law by nonlawyers in due process hearings.

* * *

Respondents Marilyn Arons and Ruth Watson are the founder and Executive Director, respectively, of respondent Parent Information Center of New Jersey, Inc ("Parent Information Center"). Parent Information Center is a non-profit organization founded in 1977 which provides advice,

counseling and advocacy services to families of children with disabilities. Parent Information Center operates largely through volunteers. It does not receive government or corporate funding, but derives income through membership dues (assessed on the basis of ability to pay) and contributions. Ms. Arons is an educator and curriculum specialist by training and has completed the course work necessary for a Ph.D. in Neuroscience and Education from Teachers College, Columbia University, New York. Neither Ms. Arons nor Ms. Watson is a lawyer.

IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" and "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(c)(1). In IDEA, Congress devised a system of funding special education and evaluative procedures, 20 U.S.C. § 1411, and required states and localities that accept funding to create and utilize an elaborate plan for providing special education that identifies children who need special educational assistance and determines what assistance each child needs. 20 U.S.C. §§ 1412-1414.

Delaware participates in and receives federal funds under IDEA and, accordingly, conforms its proceedings governing special education of children with disabilities to IDEA requirements, as well as to Delaware law.

IDEA is intended to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education..." 20 U.S.C. § 1415(a). States and localities must allow "the parents of a child with a disability to examine

all records relating to such child ... and the provision of a free appropriate public education to such child...." 20 U.S.C § 1415 (b)(1) "[W]ritten prior notice [must be given] to the parents of the child" whenever schools either propose to change or initiate, or refuse to change or initiate, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education service to the child (commonly referred to as the "IEP"). 20 U.S.C. § 1415(b)(3)(B). The parents must have the "opportunity to present complaints with respect to any matter" relating to the IEP. 20 U.S.C. § 1415(b)(6). When complaints are received, "the parents involved in such complaint shall have an opportunity for an impartial due process hearing," 20 U.S.C. § 1415(f), and for an impartial review on appeal to a state educational agency. 20 U.S.C. § 1415(g). IDEA specifies, among other things, the following procedural rights of parties to IDEA due process hearings:

> Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded--
>
> > (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
> >
> > (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

> (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and
>
> (4) the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(2 1) of this title).

20 U.S.C. § 1415(h).

Consistent with its obligations under IDEA, the Delaware Department of Public Instruction provides due process hearings to address the complaints of parents relating to IEPs. Detailed regulations address the initiation of such hearings, the composition and qualifications of the hearing panel and its members, the conduct of the hearing and the rights of the parties thereto. Delaware Administrative Procedures Manual, 72 000 CDR 002-75 through -78 (Weil Pub. 1996). These regulatory requirements mirror IDEA in providing that "Any party to a hearing has the right to: (1) be accompanied and advised by counsel or [sic] by individuals with knowledge or special training with respect to the problems of students with disabilities; [and] (2) present evidence, confront, cross-examine

and compel the attendance of witnesses...." *Id* at 002-77.

The State Superintendent of Public Instruction and the district involved are required to provide information regarding the availability of free or low-cost legal services which may be available. *Id.* at 002-75, 002-77-78. Insofar as the record discloses, however, the only legal services organization that has provided legal representation by counsel at Delaware IDEA due process hearings is Delaware's Community Legal Aid Society, Inc., which has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria.

Due process hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings. The parties consist of parents; the local school board, which is always represented by counsel; and the Department of Public Instruction, represented by a lawyer from the Office of Attorney General. The hearing panel must consist of one attorney admitted to practice in Delaware; one educator certified in the area of special education or who has been a post-secondary educator in the area of programs for students with disabilities; and one layperson with demonstrated interest in the education of students with disabilities who is included on an approved list compiled by the Governor's Advisory Council for Exceptional Citizens. Hearings are chaired by the attorney member of the panel, who is charged with writing the panel's decision. Although the rules of evidence do not strictly apply, the Chair makes rulings on matters such as (i) objections (*e.g.*, relevance, materiality, and admissibility); (ii) issues of law (*e.g.*, burden of proof); and (iii) qualifications of experts. In advance of the hearing, exhibits must be marked and the parties must exchange witness lists and all documents to be offered.

Due process hearings begin with opening statements

from each party. Because the school board bears the burden of going forward, it presents its case first. Evidence is presented through witnesses, who are subjected to direct and cross examination. After the school board rests, the Department of Public Instruction is afforded an opportunity to present its case. The parents put their case on last, although there is then an opportunity for rebuttal testimony. Following the presentation of evidence, the parties give closing statements to the panel and may be asked to file written submissions on key questions. On average, hearings last from two to four days.

Although due process hearings have the trappings of formal adjudications, the issues presented for resolution typically involve complex factual questions relating to the unique learning needs of the disabled child. The fact witnesses who appear at these hearings are typically school officials (teachers, guidance counselors, and principals), and the expert witnesses are generally neurologists, psychiatrists, psychologists, physicians, and others with expertise in educational and developmental sciences.

Ms. Arons and Ms. Watson are nonlawyers with "special knowledge or training with respect to the problems of children with disabilities." As part of their advice, counseling and advocacy services to families of children with disabilities, respondents frequently represent such families in IDEA due process hearings. Parent Information Center has handled approximately 500 due process hearings on behalf of families of children with disabilities, mostly in New York and New Jersey but also in Pennsylvania and, on at least five occasions, in Delaware.[1] It is not asserted that the families of children with

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[1]In Delaware hearings relating to Nicholas DeCrease, Kevin Coale, Matthew Hayes and Shawn White were handled

disabilities whom respondents have represented at due process hearings in Delaware believed that respondents were lawyers, or that respondents held themselves out as such. Indeed it is stipulated that these families sought legal counsel, but could not find an attorney willing to represent them on a standard fee-for-service basis, or to represent them on some reduced cost or pro bono basis. At the Delaware due process hearings identified above, Ms. Arons or Ms. Watson presented the parents' positions to the panel, including by making opening statements, examining and cross-examining witnesses, making and arguing evidentiary objections, introducing exhibits, proffering other records and documents, presenting procedural motions such as motions for summary judgment, submitting briefs and other documents and arguing for particular remedies.

In challenging respondents' representation of parents in due process hearings, ODC does not seek to prove that the respondents did not provide diligent and effective service to she families involved. For their part, respondents do not argue that their role in the due process hearings at issue did not constitute the "practice of law," which in any event is commonly understood to include such activities as those engaged in by respondents and listed above in their "'pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal.'" *Delaware State Bar Ass'n v. Alexander*, Del. Supr., 386 A.2d 652, 661 (1978), *quoting Tumulty v. Rosenblum*, N.J. Supr., 48 A.2d 850, 852 (1946). Accordingly, the central issue for our decision is whether IDEA preempts the Delaware Supreme Court's authority to prohibit nonlawyers from practicing law in due process hearings by virtue of the provision in 20 U.S.C. § 1415(h)(1) requiring that parents be

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by Ms. Arons. The hearing in Delaware relating to Phillip Russ was handled by Ms. Watson.

accorded "the right to be accompanied and advised ... by individuals with special knowledge and training with respect to the problems of children with disabilities."

* * *

The Delaware Supreme Court has inherent jurisdiction over the practice of law within Delaware. *Delaware State Bar Ass'n v. Alexander*, 386 A.2d at 654; *In re Appeal of Infotechnology, Inc.*, Del. Supr., 582 A.2d 215, 220 (1990); *In re Petition of Nenno*, Del. Supr., 472 A.2d 815, 819 (1983) (noting significance of separation of powers doctrine). While aspects of the Court's authority are referenced by statute, *see, e.g.*, 10 *Del. C.* § 1906, the source of this inherent authority rests in the jurisprudence of England transplanted to the Colonies prior to the time of their separation from the Crown. In view of the exhaustive treatment of this subject by the Supreme Court in *Delaware Optometric Corp. v. Sherwood*, Del. Supr., 128 A.2d 812, 815-817 (1957), it is unnecessary to recount in detail the historical development of authorization or licensure to practice law as a prerequisite to practice that profession. It is pertinent to observe, however, that from early times it has been recognized as necessary to the public welfare to regulate and oversee those who seek to represent the interests of others before tribunals. *Delaware Optometric Corp. v. Sherwood*, 128 A.2d at 816. As our Supreme Court has found:

> The justification for the existence of this [regulatory] power inherently in the courts is the necessity for the proper administration of justice, which can be achieved only if the procedures and practices of the courts are fair and reasonable, and the officers of the court, the lawyers, are competent and ethical. Thus it is that by rule of court requirements are

> established for admission to the Bar, and standards of ethical conduct established, to which all lawyers must conform to continue in the practice of law. The policing of these requirements is achieved by the inherent power of the court to discipline lawyers for violations.

In re Member of the Bar, Del. Supr., 257 A.2d 382, 383 (1969).[2]

Under the common law rule thus in existence in Delaware since before the separation of the Colonies from the Crown, the "admission of attorneys to practice, and the

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[2]There are, of course, those who portray limitation of the right to practice law as monopolistic or oligarchic economic protectionism benefitting those already authorized to practice. While not explicitly advanced by respondents as an argument, it is alluded to in the briefing. ("The purpose of UPL laws is to protect the public, not to preserve the lawyer monopoly over the delivery of legal services.") This is not a pertinent consideration in the case before us; the stipulated facts establish that there was no universe of lawyers willing to take on the cases handled by respondents on a standard fee-for-service basis. It would in any event not be a pertinent consideration in Delaware since, at least in Delaware, it is well established that the right or authority to practice law is not a franchise which may be protected as a property right against competition. *Delaware Optometric Corp. v. Sherwood*, 128 A.2d at 817 ("The lawyer's license ... is not the grant of a property right which the individual may protect by injunction [against unauthorized competition]. To regard it otherwise is to make the legal profession a business, and to destroy the very reason for its existence").

exclusion of unauthorized persons from practice lie within the province of [the Supreme] court. A violation of [the Supreme] court's exclusive right to license attorneys at law by presuming to practice law without such license is a contempt of its authority and punishable as such." *Delaware Optometric Corp. v. Sherwood*, 128 A.2d 816-17.[3]

The policing of the Bar and, thus, of the practice of law in general takes numerous forms. For example, as the Court itself noted in upholding mandatory annual assessments for the benefit of the Clients' Security Trust Fund (now known as the Lawyers' Fund for Client Protection):

> It must be borne in mind that lawyers, constituting the Board of Bar Examiners by appointment of this Court, control admissions to the Bar. In a sense, therefore, the profession holds out to the public all its members in good standing as being competent, honest and devoted to their clients' interests. This, it seems to us, is in the nature of a collective representation by the Bar to the public, and justifies a collective acceptance of responsibility when one of its members is false to his oath and the common precepts of honesty.

In re Member of the Bar, 257 A.2d at 3 83. Similarly, lawyers are subject to detailed rules of professional conduct (*see* Delaware Lawyers' Rules of Professional Conduct), rules

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[3]This approach is not unique to Delaware, but widely accepted in many other states. *See In the Matter of Thomas Alexander Jr.*, Bd. on the Unauthorized Practice of Law, UPL-2, 1992 (July 8, 1993) (Opinion) and cases collected therein.

requiring continuing education (*see* Delaware Rules for Mandatory Continuing Legal Education), annual registration requirements (see Supreme Court Rule 69), rules relating to abandoned or unclaimed client trust funds (*see* Supreme Court Rule 73), rules governing segregation of and accounting for client funds (*see* Rule 1. 15, Delaware Lawyers' Rules of Professional Conduct), and rules restricting and regulating advertising and other communications about legal services that might create unjustified expectations or that might otherwise mislead (*see* Rules 7.1 - 7.5, Delaware Lawyers' Rules of Professional Conduct). It is undisputed that these restrictions, limitations, requirements and client protections are not generally applicable to nonlawyers.

Respondents' contention that their practice of law without admission to practice nonetheless constitutes the authorized practice of law under IDEA rests principally upon their assertion that (i) 20 U.S.C. § 1415(h)(1) on its face authorizes "individuals with special knowledge or training with respect to the problems of children with disabilities" to represent parties to due process hearings, by virtue of its conferral of a right to such parties to be accompanied and advised by such individuals, and (ii) IDEA thereby preempts under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the traditional regulation of the practice of law by the Delaware Supreme Court.

We do not read Section 1415(h) as providing that a party to a due process hearing may be "represented" by individuals with special knowledge or training with respect to the problems of children with disabilities. It provides only that a party may be "accompanied and advised" by such persons. Where Congress (or an agency to which Congress has granted clear regulatory authority) has intended to allow representation of parties by nonlawyers in administrative or other proceedings,

it has been explicit in its language doing so. *See, e.g., Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, 384 (1963) (statute providing that the Commissioner of Patents "may prescribe regulations governing the *recognition* and conduct *of agents*, attorneys, *or other persons* representing applicants or other persons before the Patent Office" authorized Commissioner to provide by regulation that patent applicant "*may be represented by an attorney* or *agent* authorized to practice before the Patent Office") (italics in opinion); 7 U.S.C. § 2020(e)(7) (1988) and 7 CFR § 273.15(p)(2) (Food Stamp Act provision and regulation allowing "households" in certification process to "be represented ... by a person other than a member of the household so long as the person has been clearly designated as the representative ... and ... is an adult" and in grievance proceedings to "present the case or have it presented by a legal counsel or other person"); 45 CFR § 205.10(a)(3)(iii) (1997) (provision regulating state plans under Social Security Act allowing applicants and recipients to be "represented by an authorized representative, such as legal counsel, relative, friend or other spokesman"); 38 U.S.C. § 5904(a) ("The Secretary may recognize any individual as an agent or attorney for the preparation, presentation and prosecution of claims under laws administered by the Secretary" relating to veterans' benefits). In IDEA, by contrast, Congress did not clearly reflect by the words chosen that lay representation was being authorized. Rather, it used words -- "accompanied and advised" -- which do not ordinarily convey the concept of representation.[4]

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[4]We do not accept the argument that, in lumping "counsel" and "individuals having special knowledge or training" together in Section 1415(h)(1), the statutory language implies an equivalence of permissible roles for the two categories of persons. Counsel have inherent and presumptive representational authority, while individuals with special

Accordingly, we find that the plain language of Section 1415(h)(1) does not authorize individuals having special knowledge or training with respect to the problems of children with disabilities to represent parties in due process hearings.

While it is a basic tenet of statutory construction that resort to extrinsic aids to construction is unnecessary in the absence of ambiguity, and we find no ambiguity in the carefully drawn language of the statute, we note that the Joint Explanatory Statement of the Committee of Conference set forth in the Senate Conference Report, which addressed IDEA (then known as the Education of All Handicapped Children Act) as finally adopted, explained the due process provisions as providing the "right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." S. Conf. Rep. No. 94-445, reprinted in 1975 U.S.C.C.A.N. 1480, 1503. This language confirms the clear distinction between the representational role of counsel and the advisory role of nonlawyers which we perceive.

Our finding is consistent with that expressed by the United States Court of Appeals for the Third Circuit in *Arons v. New Jersey State Board of Education*, 842 F.2d 58 (3d Cir.), *cert. denied*, 488 U.S. 942 (1988). There, Ms. Arons sought an

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knowledge or training with respect to the problems of children with disabilities do not. Indeed, it is an ancient and original function of counsel to represent others in pleading cases -- to stand in the client's stead -- while it is no traditional part of the role of individuals with special knowledge or training in the problems of children with disabilities to do so, so far as this record reveals. Congress may be presumed to have understood this.

award of fees for her successful representation of parents in a due process hearing, but was denied fees on the ground that the New Jersey regulation authorizing such fees permitted payment only of legal fees, and not fees of lay advocates.[5] Ms. Arons appealed, arguing that the no-lay-fee rule stood as an obstacle to the full accomplishment of the IDEA objectives (because the rule would discourage parties from using nonlawyer representatives which Ms. Arons claimed (and here claims) Section 1415(h)(1) authorized) and was therefore preempted by IDEA.

The Third Circuit squarely rejected this view. It said:

> The carefully drawn statutory language does not authorize these specially qualified individuals to render legal services. Although the Act does give "[a]ny party to any hearing" the right to "present evidence and confront, cross-examine, and compel the attendance of witnesses," Id. § 1415(d)(2) [now (h)(2)], those functions are not designated to be performed by lay advocates. Furthermore, the statute does not use the word "represent" in subsection (d)(l) [now (h)(l)], as would be expected if Congress intended to place expert and legal counsel on the same footing.
>
> Our search through the legislative

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[5]By regulation, New Jersey permits -- as a matter of state law -- the representation of parents in due process hearings by nonlawyers. Indeed respondents advise that Delaware is alone among the fifty states in precluding nonlawyer representation in these circumstances.

> history has failed to uncover any indication that Congress contemplated that the "individuals with special knowledge" would act in a representative capacity. The Senate Report describes the "individual['s]" role as one of consultation, with emphasis on the responsibility to identify educational problems, evaluate them, and determine proper educational placement. S. Rep. No. 168, 94th Cong., lst Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News pp. 1425, 1470-71.
>
> The provisions's text and history thus cast substantial doubt on the plaintiff's statement in her brief that "Congress intended that no distinction be drawn between lawyers and lay advocates."

842 F.2d at 62. Whether or not binding in a precedential way, we find this analysis persuasive and note that in none of the amendments of IDEA adopted since Arons was decided has Congress attempted legislatively to overrule this judicial interpretation.

Respondents argue that, notwithstanding the foregoing, we are bound to give controlling deference to an interpretation of the "accompanied and advised" language found in an April 8, 1981 letter of Theodore Sky, then Acting General Counsel of the United States Department of Education (the "Sky Letter"), in which he concluded that notwithstanding the Senate Conference Report and the absence in Section 1415(h)(1) of the term "represent," lay advocates are permitted to represent parties at administrative hearings and appeals. *Letter of Theodore Sky, Acting General Counsel, Department of Education, to the Honorable Frank B. Brouillet. Superintendent*

of Public Instruction, State of Washington (April 8, 1981).

In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the United States Supreme Court addressed deference to administrative statutory interpretations. Under the Court's analysis, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter ...." 467 U.S. at 842. If the statute is silent or ambiguous on the issue, however, a court must determine whether the agency's construction is permissible. *Id.* at 843. If Congress expressly delegated "authority to the agency to elucidate a specific provision of the statute by regulation ... [s]uch legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843-44. If the legislative delegation is merely implicit, however, deference is due only to a "reasonable" administrative interpretation. *Id.* at 844. Less deference is due to informal agency interpretations, which is what is involved here, than to formal agency regulations adopted after a notice and comment period. *See, e.g., Cleary ex rel. Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir. 1999); *Converse County Sch. Dist. No. Two v. Pratt*, 993 F. Supp. 848, 859 n. 4 (D.Wyo. 1997).

In Section 1415(h)(1) Congress has spoken directly to the precise question of who may assist parties in such hearings: counsel, who have inherent representational authority, and individuals with special knowledge or training with respect to the problems of children with disabilities, who do not. The usage of the phrase "accompanied and advised" rather than the term "represented" or words of similar import, when viewed against the long-established regulation of the practice of law under State, not federal or administrative, authority, and the evidence that Congress well knew how to authorize lay representation in clear terms when it wished to do so, establish

that Congress did not Intend to mandate a right to lay representation in due process hearings.[6] Congress chose not to include language in Section 1415(h)(1) according representational authority to the identified category of nonlawyers. Thus we conclude that, because the intent of Congress is clear, deference to the conclusion stated in the Sky Letter is not required.

Even if the Congressional intent were less than clear, Congress did not explicitly delegate to the United States Department of Education the responsibility to determine issues of authority to practice law, that is, to elucidate whether under the "accompanied and advised" clause parties to due process hearings are entitled to be represented by nonlawyers. Therefore, only a "reasonable" administrative interpretation requires deference. Accordingly we next review the Sky Letter's analysis of the question.

In reaching its conclusion that Section 1415(h)(1) authorizes lay representation in due process hearings the Sky Letter relied on three factors. First, it reasoned that because no "bifurcation of function" is set forth in the statute between counsel on the one hand and individuals with special

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[6]The ease with which Congress could have made its intention clear had it wished to authorize lay representation is illustrated by the approach taken in the New York Administrative Code, which provides that "the parties to the proceeding may be *represented* by legal counsel or by individuals with special knowledge or training ... and may be accompanied by other persons of their choice." *Connors v. Mills*, 34 F. Supp. 2d 795, 807 (N.D.N.Y. 1998), *quoting* N.Y. Comp. Codes R. & Regs. tit. 8 § 200.5(c)(5) (1998) (italics supplied).

knowledge or training with respect to the problems of children with disabilities on the other, the permissible roles of the two must be the same. In reaching this conclusion, however, Sky overlooked the inherent and presumptive representational authority with which counsel are cloaked, traditional authority which nonlawyers simply do not share. For the reasons expressed in footnote 4 above, this factor although overlooked is highly relevant.

Second, Sky placed no weight on the Senate Conference Report, but rested his interpretation on the remarks of a single Senator (Senator Cranston), who noted that the "procedural requirements [of IDEA] ... are *consistent* with the existing California statutory and master plan requirements on this subject." 121 Cong. Rec. 37418-9 (1975) (italics ours). Sky then observed that under California practice at the tune, lay advocates represented parties in California due process hearings.[7] Leaving to one side reliance upon a general statement of procedural *consistency* between two statutory schemes to prove an intention that there be *identity* between the two schemes on a narrow and specific subsidiary point, Sky's reliance on the remarks of a single Senator to the exclusion of a distinction evident in the Senate Conference Report renders his analysis unpersuasive. *See Consumer Prod. Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102 (1980) ("[C]ontemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative

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[7]Subsequently, however, it has been held that not even an attorney may appear in a representative capacity at a due process hearing unless he or she is a member of the California Bar. *See Z.A. v. San Bruno Park Sch. Dist.*, 165 F.3d 1273 (9th Cir. 1999).

history").[8] The "well-established presumption that Congress is understood to legislate against a background of common-law principles," of which the "rule that a non-lawyer may not represent another person in court is a venerable [one]" would to the contrary lead a court a court to be "reluctant to assume, absent strong evidence to the contrary, that Congress intended to override this well-settled rule using ambiguous statutory language " *Collinsgru v. Palmyra Bd. of Educ*, 161 F.3d 225, 231-32 (3d Cir. 1998).

Third, and finally, Sky relied upon the fact that lay representation has been authorized by Congress for certain other types of administrative proceedings. But this conclusion failed to consider that in the examples relied upon by Sky the intention to allow lay representation was explicit. Indeed it is these very examples, some of which we have detailed above in concluding that Congress knew how to authorize lay representation when it wished to do so, and others of which are self-evidently to the same effect, that demonstrate that Congress did not choose in this instance to authorize lay representation.

For these reasons we cannot conclude that the interpretation of Section 1415(h)(1) reached in the Sky Letter

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[8]Sky also failed to note or credit the remarks of Senator Williams, who (in contrast to Senator Cranston) provided a detailed analysis of the legislation and remarked, as the Senate Conference Report had, that parents would have "the right to counsel and to be advised and accompanied by individuals with special knowledge, training or skills with respect to the problems of handicapped children." 121 Cong. Rec. 37416.

is one to which we must grant controlling deference.[9] We turn next to respondents' argument that to the extent Delaware law proscribes their practice of law in due process hearings as unauthorized, principles of federal preemption arising under the Supremacy Clause of the United States Constitution override Delaware's regulatory authority.

Under principles of federal preemption, state law may be preempted in either of two general ways. First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr - McGee Corp.*, 464 U.S. 238, 248 (1984), *reh'g denied*, 465 U.S. 1074 (1984). Second, if Congress "has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (citation omitted). *See also Florida Lime & Avocado Growers. Inc. v. Paul*, 373 U.S. 132, 142-3 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In these latter categories, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Wylain. Inc. v. TRE Corp.*, Del. Ch., 412 A.2d 338, 346 (1979), *quoting Merrill Lynch, Pierce*

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[9]Two other letters expressing administrative interpretations have been brought to our attention: *Request of Eig*, EHLR [1987 Transfer Binder] 211:270, Supp. 57 (CCR Publishing Co.); *Virginia Dep't of Education*, EHLR [1987 Transfer Binder] 257:349, Supp. 84 (CCR Publishing Co.). Both are brief and conclusory, failing to express any administrative analysis which might otherwise call for deference.

Fenner & Smith Inc. v. Ware, 414 U.S. 117, 127 (1973). *See also Shamrock Assocs. v. Texas Am. Energy Corp.*, Del. Ch., 517 A.2d 658, 661-62

"Federal statutes impinging upon important state interests 'cannot ... be construed without regard to the implications of our dual system of government....'" *BEP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1993), *reh'g denied*, 512 U.S. 1247 (1994), *quoting* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539-40 (1947). Thus, there is a "presumption against finding preemption of state law in areas traditionally regulated by the States." *California v. ARC America Corp*, 490 U.S. 93, 101 (1989). "As is always the case in our preemption jurisprudence," where "federal law is said to bar state action in fields of traditional state regulation ... we have worked on the 'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997), *quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travellers Ins. Co.*, 514 U.S. 645, 655 (1995). *See also Department of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 345 (1994) ("When determining the breadth of a federal statute that impinges upon or preempts the States' traditional powers, we are hesitant to extend the statute beyond its evident scope"). Accordingly, "where the intent to override is doubtful, our federal system demands deference to long-established traditions of state regulation." *BEP v. Resolution Trust Corp.*, 511 U.S. at 546.

It is not claimed that in enacting IDEA Congress intended to occupy the field of education of children with disabilities to the exclusion of the States. Rather, respondents argue that Delaware's assertion of authority to regulate the

practice of law by prohibiting those not admitted to practice from representing parties in due process hearings conflicts directly with the mandate of Section 141 5(h)(1) according parents of children with disabilities the right, as respondents see it, to be represented by respondents as individuals with special knowledge or training with respect to the problems of children with disabilities.

It cannot be gainsaid that the regulation of the practice of law is a traditional State function -- existing indeed since the founding of the Union. Nor can it be doubted that the States have a substantial interest in the regulation of the practice of law within their borders. As the United States Supreme Court noted only months before the Education of All Handicapped Children Act (now IDEA) was adopted in 1975, "the States have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public ... they have broad power to establish standards for licensing practitioners and regulating the practice of professions.... The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, *reg'h denied*, 423 U.S. 886 (1975). This compelling state interest has been recognized specifically in the IDEA context:

> The requirement of representation by counsel is based upon two cogent policy considerations. First, there is a strong state interest in regulating the practice of law. Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the court from poorly drafted, inarticulate, or vexatious claims. *See Brown v. Ortho*

> *Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D.Va. 1 994) (noting that "the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court"). ... Not only is a licensed attorney likely to be more skilled in the practice of law, but he or she is also subject to ethical responsibilities and obligations that a lay person is not. In addition, attorneys may be sued for malpractice. *See id.*

Collinsgru, 161 F.3d at 231; *see also Arons*, 842 F.2d at 63. Accordingly, in interpreting IDEA, we may find preemption of this area of "traditional regulation" or "historic police power" of the States only if we can conclude that preemption was the "manifest intent" of Congress.

For the reasons we have outlined above we cannot so conclude. First, we do not interpret the language of Section 1415(h)(1) as granting any clear right to lay representation. Thus we see no actual conflict between the state and federal schemes. *Sperry v. Florida ex rel. Florida Bar*, relied upon by respondents, likewise does not establish preemption on these facts. *See Arons*, 842 F.2d at 61-62 (analyzing *Sperry* and rejecting a similar, if not the identical, claim). It would, indeed, be contra~y to the established precepts cited above for us to interpret Section 14150(1) so expansively as to extend it beyond its evident scope into an area of traditional state regulation when we see no manifest intent of Congress that it be so extended. It is more reasonable to harmonize the state and federal schemes than to set one above the other where such is not necessary to the federal purpose. *Wylain, Inc. v. TRE Corp.*, 412 A.2d at 346.

We recognize the force of respondent's contention that

representation of families of children with disabilities by laypersons such as themselves could serve the accomplishment of the full objectives of Congress under IDEA. At least insofar as this record reflects the parties in question were unable to find attorneys who would agree to represent them on a standard fee-for-service basis, a low-cost basis or pro bono. But the mandate of Congress under Section 1415 is not that the parents of children with disabilities who disagree with an IEP receive free or low-cost representation. The Congressional mandate is that they "shall have an opportunity for an impartial due process hearing" We cannot conclude on the evidence before us that under the procedures adopted by the State that opportunity is lacking. The absence of a universe of low cost or pro bono attorneys willing to take on these cases -- which, notably, Congress sought to remedy by amending IDEA to allow an award of attorneys fees to prevailing parents while pointedly not amending Section 1415(h)(1) to clarify the claimed right to lay representation -- does not in itself demonstrate that the purpose and objectives of Congress are impeded by the traditional prohibition of legal representation of parties by persons untrained in the law.[10]

In so concluding we make no qualitative judgment concerning the efficacy of the services and advocacy respondents themselves have provided. It is no part of our task to reach such a judgment. By all accounts respondents are

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[10]Respondents fear that the prohibition against the practice of law by respondents will result in intractable due process concerns. The cases cited by respondents do not, however, lead us to conclude that there is a generalized due process right to representation by lay advocates in the context of IDEA due process hearings.

vigorous and knowledgeable advocates in the educational field in which they are active. Other lay advisors present or future may not be as knowledgeable, vigorous or able.

Nor is our task to determine whether lay representation in these circumstances should be permitted, or to fix the conditions and qualifications which might be placed upon any such lay representation. In this area as in many others there are those for whom it will be difficult to find free or affordable legal representation. Many other States -- perhaps all except Delaware — have decided to allow nonlawyer representation and have presumably settled upon schemes of regulation and oversight which they have concluded are sufficient in their local circumstances. Respondents and ODC agree that this is an issue that should be addressed, but it must be addressed to the proper body with rule-making authority and is not proper to our adjudicatory function.

* * *

Our task is to determine whether what respondents did as revealed on this record constituted the practice of law, and if so whether or not it was the authorized practice of law. We find that in representing the families of Nicholas DeCrease, Kevin Coale, Matthew Hayes, Shawn White and Philip Russ in due process hearings conducted by the Delaware Department of Public Instruction, engaged in the practice of law, that such practice of law was unauthorized inasmuch as respondents are not admitted to practice in Delaware, and that such practice of law was not otherwise authorized under IDEA or any other pertinent statute or regulation. Accordingly, we recommend that the Court enter its Order:

1. Declaring that Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc., in representing

the parents of Nicholas DeCrease, Kevin Coale, Matthew Hayes, Shawn White and Philip Russ in due process hearings conducted by the Delaware Department of Public Instruction respondents engaged in the unauthorized practice of law; and

2. Directing Marilyn Arons, Ruth Watson and Parent Information Center of New Jersey, Inc. to cease and desist immediately from the unauthorized practice of law in the State of Delaware.

Rule 16 of the Board provides that "[u]nless otherwise ordered by the Supreme Court or the Board, costs ... shall be assessed against the respondent in any case where the Court determines that the respondent has engaged in the unauthorized practice of law." In so providing, Rule 16 calls for an exercise of discretion regarding the award of costs. We believe this is an appropriate case, in the exercise of that discretion, not to award costs against respondents. Respondents raised legitimate issues of significant public interest and presented a good faith defense in a highly professional manner. Accordingly, we recommend that the Order entered by the Court provide further:

3. Each party shall bear her or its own costs.

FOR THE BOARD:

Samuel A. Nolen
Hearing Panel Chair

Dated: September 24, 1999

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW OF THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of: Marilyn Arons, Ruth Watson, and Parent Information Center of New Jersey, Inc.

No. UPL-4, 1996

UPL File Nos. 94-12; 95-17

STIPULATION

The Office of the Disciplinary Counsel ("petitioner") and Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. ("respondents"), through their undersigned counsel, hereby stipulate and agree that if an evidentiary hearing were to be held in this matter, the facts adduced would be as follows:

The Petition

1. This proceeding was initiated by a Petition filed by the Office of Disciplinary Counsel on August 8, 1996. An answer to the Petition, on behalf of all of the respondents, was timely filed on September 13, 1996. Copies of the Petition and Answer are appended hereto.

2. The Petition does not allege that the Office of Disciplinary Counsel has ever received a complaint by any parent regarding the conduct of respondents, and no such complaint has ever been received. Indeed, the only complaints petitioner has received regarding the efforts of respondents

have been made by school boards and their lawyers, who are the adversaries of these parents in the due process hearings and who have lost cases to respondents.

Nature of the Due Process Hearings

3. The gravamen of the Petition is that the respondents violated Delaware's rules against the unauthorized practice of law by assisting parents of disabled children in due process hearings held by the Department of Public Instruction of the State of Delaware.

4. The due process hearings arise under the Individuals with Disabilities Education Act ("IDEA"), a federal statute that was enacted because Congress recognized that "more than half of the children with disabilities in the United States do not receive appropriate educational services." 20 U.S.C. 1400(b)(3). IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs" and "that the rights of children with disabilities and their parents or guardians are protected." 20 U.S.C. 1400(c). Accordingly, Congress devised a system of funding special education and evaluative procedures, 20 U.S.C. 1411, and required states and localities that accept funding to create and utilize an elaborate plan for providing special education that identifies children who need special educational assistance and determines what assistance each child needs. 20 U.S.C. 1412-1414.

5. The State of Delaware participates in IDEA and receives federal funds under IDEA. Accordingly, the due process hearings that are the subject of this proceeding must be conducted in accordance with the dictates of IDEA, *see* 20

U.S.C. 1413, 1415(a), as well as Delaware law.

6. As noted, the heart of the IDEA is the "assur[ance] that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education . . .." 20 U.S.C. 1415(a). States and localities must allow "the parents or guardians of a child with disability to examine all relevant records with respect to . . . the child and the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(1)(A). "[W]ritten prior notice [must be given] to the parents or guardian of the child" whenever schools either propose to change or initiate, or to refuse to change or initiate, the identification, evaluation, placement, or provision of special educational services for the child (commonly referred to as the "IEP"). 20 U.S.C. 1415(b)(1)(C). This notice must be fully informative to "the parents or guardian," who must have the "opportunity to present complaints with respect to any matter" relating to the IEP. 20 U.S.C. 1415(b)(1)(D) & (E). When complaints are received, "the parents or guardian shall have an opportunity for an impartial due process hearing," 20 U.S.C. 1415(b)(2), and for an impartial review on appeal to a state educational agency. 20 U.S.C. 1415(c).

7. "Any party to any [due process] hearing conducted pursuant to subsections (b) and (c) shall be accorded the right," among other things, "to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities," to present evidence and examine witnesses, to obtain a transcript of the hearing, and to obtain written findings of fact and decisions. 20 U.S.C. 1415(d).

8. Consistent with its obligations under IDEA, the Delaware Department of Public Instruction provides due

process hearings for parents who believe that their local school districts have failed to fulfill their duties under IDEA. These are formal adjudicatory hearings that are held before a three-member panel appointed by the Department of Public Instruction. Parents play no role in the selection of panel members. The panels consist of an attorney (who is always the chairperson), an educator (generally a professor of special education or related field at a Delaware college or university), and a lay person. Lay committee members are selected from a list of individuals who have passed a training course sponsored by the Department of Public Instruction. Every panel therefore consists of two nonlawyers and one lawyer.

9. The due process hearings are governed both by federal law (which is set forth above) and Delaware law, which provides that "[a]ny party to a hearing has the right to be accompanied and advised by counsel or by individuals with special knowledge or training with respect to the students with disabilities." Delaware Administrative Manual, at 85.

10. Due process hearings are conducted in a manner typical of contested, adversarial adjudicatory hearings.

11. The parties consist of parents, who, as explained more fully below, are not represented by attorneys; the local school board, which is always represented by counsel; and the Department of Public Instruction because the State ultimately bears a portion of the cost of providing a disabled child an appropriate education tailored to suit the child's unique needs. Accordingly, the State is separately represented at these hearings by a lawyer from the Office of Attorney General. Thus, due process hearings always involve at least two instrumentalities of government represented by counsel, arrayed against the parents.

12. Due process hearings are chaired by the attorney member of the panel, who is charged with writing the panel's decision. Although the rules of evidence do not strictly apply, the Chair makes rulings on matters such as (I) objections (*e.g.*, relevance, materiality, and admissibility); (ii) issues of law (*e.g.*, burden of proof); and (iii) qualifications of experts. In advance of the hearing, exhibits must be marked and the parties must exchange witness lists and all documents to be offered.

13. Due process hearings begin with opening statements from each party. Because the school board bears the burden of going forward, it presents its case first. Evidence is presented through witnesses, who are subjected to direct and cross-examination. After the school board rests, the Department of Public Instruction is afforded an opportunity to present its case. The parents put their case on last, although there is then an opportunity for rebuttal testimony. Following the presentation of evidence, the parties give closing statements to the panel and may be asked to file written submissions on key questions. On average, hearings last from between two and four days.

14. Although due process hearings have the trappings of formal adjudications, the issues presented for resolution typically involve complex factual questions relating to the unique learning needs of the disabled child. As a result, the parties' representatives must be familiar with, and able to understand, the clinical aspects of the child's condition -- skills and training which lawyers ordinarily lack. The testimony at these hearings generally focuses on the adequacy and accuracy of the school board's testing, evaluation, and diagnosis of the child's problem, and the remedial measures needed to address the child's disability. The fact witnesses who appear at these hearings are typically school officials (teachers, guidance counselors, and principals), and the expert witnesses are

generally neurologists, psychiatrists, psychologists, physicians, and others with expertise in educational and developmental sciences. Thus, nonlawyers with "special knowledge and training with respect to the problems of children with disabilities," like Ms. Arons and Ms. Watson, are fully capable of presenting the parents' case to the panel. 20 U.S.C. 1415(d).

Parent Information Center of New Jersey, Inc.

15. The Parent Information Center of New Jersey ("PIC") is a non-profit organization that was founded in 1977 by respondent Marilyn Arons, a public school teacher and curriculum specialist, who has completed all of her course work for a Ph.D. in Neuroscience and Education from Teachers College, Columbia University, in New York. PIC provides advice, counseling, and, at times, advocacy services to families who have children with disabilities. PIC's work is performed almost entirely through its staff of unpaid volunteers and operates out of the homes of its family/volunteer members. PIC receives no government or corporate funding, and its shoe-string budget consists of contributions and membership dues from individuals. Annual membership dues are set on a sliding scale according to ability to pay. Those who can afford it pay $100, and those of more modest means can pay as little as a quarter. Although PIC began in New Jersey, it now does extensive work in New York State, and it has branched out as well to other states, including Pennsylvania and Delaware. Over the past twenty years, PIC has assisted parents on over 20,000 occasions, ranging from crisis intervention, counseling, and assistance in negotiating IEPs with local school boards to handling due process hearings. Parents hear of PIC through word of mouth and are referred to PIC by psychiatrists, psychologists, neurologists, social welfare organizations, school officials, child protective agencies, law school clinics, and other social service agencies. There is no other organization in the

nation that provides services to parents of children with disabilities similar to those offered by PIC.

16. PIC has handled approximately 500 due process hearings on behalf of parents with children with disabilities. Although the bulk of these hearings have been conducted in New Jersey and New York, a handful have been held in Pennsylvania and Delaware.

17. No state, apart from Delaware, has ever charged respondents -- or anyone affiliated with PIC -- with violating proscriptions against the unauthorized practice of law.

Due Process Hearings In Delaware in Which Respondents Have Provided Assistance

18. The Petition alleges that Ms. Arons provided legal advocacy to parents involved in no fewer than four due process hearings conducted by the Delaware Department of Public Instruction; namely, those involving the children identified as Nicholas DeCrease, Kevin Coale, Matthew Hayes, and Shawn White. The Petition further alleges that Ms. Watson provided legal advocacy services in at least one due process hearing, which involved a child identified as Philip Russ, conducted by the Delaware Department of Public Instruction.

19. Respondents did, in fact, accompany and advise the parents of each of the children identified in paragraph 18 in the due process hearings and, on behalf of those parents, made statements, examined and cross-examined witnesses, raised objections, proffered records and exhibits, and submitted briefs and other documents to the panel.

20. None of the parents of the children identified in paragraph 18 can afford the services of a private attorney.

21. The parents of the children identified in paragraph 18 diligently looked to find legal counsel to represent them in the due process hearing. None could find an attorney willing to represent them on a standard fee-for-service basis, and none could find an attorney willing to represent them on some reduced-cost or *pro bono* basis.

22. No legal services or other organization that provides free or low-cost legal services to people of low or modest means provides assistance in due process hearings in Delaware.

23. There is no source of funding, through fee-shifting statutes or otherwise, for lawyers to assist parents in due process hearings in Delaware.

24. Although there are child protection and advocacy services in Delaware, no organization providing such services gives assistance to parents in special education cases or due process hearings.

25. The economic reality is that parents of children with disabilities who are affluent or reasonably well-off financially enroll their children at private schools and thus do not depend on public school authorities to provide their children with an appropriate education. It is only parents who are unable to afford private education for their disabled children who are likely to end up in due process hearings in Delaware.

26. The parents of the children identified in paragraph 18 would not have exercised their right to a due process hearings under federal and Delaware law but for the availability and assistance of respondents.

27. None of the parents of the children identified in

paragraph 18 would have participated in a due process hearing without respondents' assistance because they were intimidated by the formality and complexity of the due process hearing. With the exception of Mr. and Ms. Hayes, none of the parents are college graduates, none had legal training of any sort, none were familiar with the procedures used in due process hearings conducted by the Department of Public Instruction or in legal proceedings generally, and none had the grounding in the technical issues that lay at the core of their disputes with the local schools boards to enable them to handle the hearings *pro se*.

28. None of the parents of the children identified in paragraph 18 would have participated in a due process hearing without respondents' assistance because they were also intimidated by the fact that the hearing was convened by the Department of Public Instruction (which is also an adverse party to the proceeding) and placed them in an adversarial posture against two instrumentalities of government, each represented by lawyers.

29. The parents of the children identified in paragraph 18 understood that respondents are not lawyers, do not hold themselves out as lawyers, and are not members of the Delaware bar or any other bar. Respondents disclosed those facts to them at the outset.

30. The parents of the children identified in paragraph 18 each sought out the services of respondents.

31. None of the parents of the children identified in paragraph 18 were charged a fee of any sort by respondents. Although the PIC generally requires all of the parents to whom it provides assistance to become a member of PIC, the parents of the children identified in paragraph 18 are of modest means.

Respondents have never sought payment to represent parents in due process hearings and did not seek payment from the parents of the children identified in paragraph 18. Respondents did not receive a penny from the parents of Kevin Coale or Matthew Hayes, and received only nominal amounts from the parents of Nicholas DeCrease and Phillip Russ to defray travel and other expenses. Nicholas DeCrease's parents paid $1,000 for expenses, which did not begin to cover the actual cost to PIC, which included extensive travel and other costs. Phillip Russ' parents contributed $300, which also did not cover PIC's actual, out-of-pocket expenses. These payments were made voluntarily by the parents, and not as a condition for the work respondents performed on their behalf.

32. The parents of the children identified in paragraph 18 are extraordinarily grateful for the services rendered to them and their families by respondents and believe that their position was effectively presented in the due process hearings.

33. In fact, the results respondents achieved for the children identified in paragraph 18 confirm the effectiveness of the presentation made on their behalf. In each case, the parents and child won significant relief, either at the due process hearing itself, or on judicial review, which is based on the record created at the due process hearing.

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Dated: August 4, 1998

BOARD ON THE UNAUTHORIZED PRACTICE OF LAW
OF THE SUPREME COURT OF THE STATE OF
DELAWARE

In the Matter of:
MARILYN ARONS, RUTH WATSON, and PARENT
INFORMATION CENTER OF NEW JERSEY, INC.
Respondents.

CONFIDENTIAL

No. UPL-4,1996

(UPL File Nos. 94-12; 95-17) OF

AMENDMENTS TO STIPULATION

The Office of Disciplinary Counsel ("Petitioner") and Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc. ("Respondents"), through their undersigned counsel, hereby stipulate and agree to the following amendments to the Stipulation entered into by the Petitioner and the Respondents and filed with the Board on the Unauthorized Practice of Law on August 6, 1998. Where the language of the Stipulation as been altered, any new or additional language is underlined; deleted language is in brackets.

1. The first sentence of paragraph 11 of the Stipulation is amended to read as follows: "*In cases involving private placements, like the cases that gave rise to this proceeding*, the parties consist of parents, who, as explained more fully below, are often not represented by attorneys; the local school board, which is always represented by counsel; and

the Department of Public Instruction because the State ultimately bears a portion of the cost of providing a disabled child an appropriate education tailored to suit the child's unique needs."

2. The last sentence of paragraph 11 of the Stipulation is amended to read as follows: "Thus, due process hearings *concerning private placements* [always] involve two instrumentalities of government represented by counsel, arrayed against the parents."

3. The last sentence of paragraph 14 of the Stipulation is amended to read as follows: "*Ms. Arons and Ms. Watson are nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities.*'" [Thus, nonlawyers with 'special knowledge and training with respect to the problems of children with disabilities,' like Ms. Arons and Ms. Watson, are fully capable of presenting the parents' case to the panel. 20 U.S.C. § 1415(d).].

4. Paragraph 22 of the Stipulation is amended to read as follows: "*Insofar as the parties are aware, the only legal services organization that has provided legal representation by counsel at Delaware IDEA due process hearings is Delaware's Community Legal Aid Society, Inc., which has, on occasion, provided representation at IDEA due process hearings to parents and children whose cases satisfy the organization's case acceptance criteria.*" [No legal services or other organization that provides free or low-cost legal services to people of low or modest means provides assistance in due process hearings in Delaware.].

5. Paragraph 23 of the Stipulation is deleted in its entirety. [There is no source of funding, through fee-shifting statutes or otherwise, for lawyers to assist parents in due

process hearings in Delaware.].

6. Paragraph 33 is amended to read as follows: "*The parents and children identified in paragraph 18 obtained some form of relief, at the due process hearing itself, on judicial review (which is based upon the record created at the due process hearing), or through negotiation or settlement.*" [In fact, the results respondents achieved for the children identified in paragraph 18 confirm the effectiveness of the presentation made on their behalf. In each case, the parents and child won significant relief, either at the due process hearing itself, or on judicial review, which is based on the record created at the due process hearing.].

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